

## MEDICAL JURISPRUDENCE

### Unauthorized Treatment—Scope of Consent

PEART, BARATY & HASSARD OF THE CALIFORNIA BAR

In *Wheeler v. Barker*, 92 ACA 915 (July 11, 1949) the California District Court of Appeals was presented with the following facts:

Mrs. P. was being treated by Dr. D. for continued vaginal bleeding. In January 1946, Dr. D. upon making a pelvic examination had found what appeared to be a small fibroid tumor on the anterior surface of the uterus. In succeeding months other examinations by Dr. D. revealed the mass in the right ovarian region at first to be about half as large as a walnut which grew to the size of a lemon. During July 1946 Mrs. P. consulted physicians in Santa Barbara. One diagnosed her symptom as an ovarian cyst and the other as a growth on the uterus. Both recommended immediate surgery. Mrs. P. told Dr. D. of these examinations and recommendations. On August 1, 1946, Mrs. P. was again examined by Dr. D. and he again advised surgery.

Mrs. P. testified that she consented only to the removal of the right ovary and nothing more. Defendant and his nurse testified that he told plaintiff it might be necessary to remove the right ovary or the uterus, depending on the condition found when her abdomen had been opened, and that he promised not to remove both ovaries, which was the only limitation requested by plaintiff.

On August 4, 1946, Mrs. P. went to a hospital in Ventura where she signed a consent to "whatever anesthetic and operation which may be decided to be necessary or advisable." A registered nurse signed as a witness.

On August 5, 1946, Dr. D., assisted by another physician, performed the operation. Upon making the opening in plaintiff's abdomen they found the ovaries were not diseased but the mass which had been felt on examination was a large tumor attached to the uterus, adjacent to the right ovary, and that the uterine wall was filled with multiple fibroid tumors. The surgeons consulted about the condition found and agreed that a subtotal hysterectomy was necessary and proceeded with that operation. Upon its completion plaintiff's husband was told what had been done and when the effects of the anesthetic had subsided plaintiff was likewise told what had been removed. Neither of them expressed any dissatisfaction. The postoperative course was normal. The first difficulty between the parties arose when Dr. D. refused to give Mrs. P. sleeping pills. She became angry and ceased to be Dr. D.'s patient. Thereafter Mrs. P. brought an action against Dr. D. to recover damages for technical assault and battery on the ground that Dr. D. had performed an alleged unauthorized operation on Mrs. P. In the trial before a jury a verdict was rendered in favor of Dr. D. and the verdict and judgment were affirmed on appeal by the District Court of Appeal.

Dr. D., his assistant surgeon and another local

physician all testified that the operation was necessary in accordance with the standards of practice in the community to preserve Mrs. P.'s health, and that the bleeding would have continued had the uterus not been removed. There was evidence that Mrs. P.'s condition of health might have become worse, that the bleeding would have continued, and that the tumor might have become malignant.

In its decision affirming the verdict of the jury, the court held that the purpose of the operation was to stop the vaginal bleeding that had continued for several months and remove the growth on the female organs. "It was defendant's duty to do whatever was necessary to effect a cure. In exercising his best judgment as to what was the proper course to pursue he was performing a professional service for which he had been employed. When a surgeon is confronted with an emergency or an unanticipated condition and immediate action is necessary for the preservation of the life or health of the patient and it is impracticable to obtain consent to an operation which he deems to be immediately necessary, it is his duty to do what the occasion demands within the usual and customary practice among physicians and surgeons in the same or similar localities, and he is justified in extending the operation and in removing and overcoming the condition without the express consent of the patient."

By the signed consent Mrs. P. agreed to whatever operation was decided to be necessary or advisable. This instrument furnished the basis for the admission of evidence that a necessity existed for the removal of two-thirds of Mrs. P.'s uterus and that it was necessary for Dr. D. and his assisting surgeon to make an emergency decision upon discovery of its condition. Mrs. P. contended that although an emergency may have existed, the removal of her uterus was not necessary at that time. The court held that Dr. D. was justified in the extent of his operation because the existence of a large fibroid tumor on the uterus and multiple tumors and nodules on the inner walls constituted an emergency which required the surgeons, in the light of their experience, to determine at once whether the removal of the diseased portion was necessary for the preservation of Mrs. P.'s health. The court further stated that "defendant doctor would have been subject to grave censure had he closed the incision and awaited plaintiff's recovery from the effects of the anesthetic in order to have further consultation with her concerning the removal of the alien material."

In these circumstances the District Court of Appeal held that Dr. D. was confronted with a necessity and emergency and that preservation of the health of Mrs. P. depended upon the removal of the foreign growth, together with that portion of the uterus to which it was attached, at the time of the operation.